

LAW, FACTS, AND PERSONS: POLICE POWERS, NEUTRAL PRINCIPLES, AND CONSTITUTIONAL CHANGE

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Modern constitutional discourse has been dominated by a question and a quest. The question is relatively straight-forward: Can we accept the legitimacy of the Supreme Court's decisions in *Griswold v. Connecticut*¹ and *Roe v. Wade*² while condemning *Lochner v. New York*?³ Both kinds of decisions rest upon some understanding of "liberty" and the kinds of liberty the Constitution protects; both depend on the declaration of a constitutional value ("liberty of contract" in *Lochner*; "privacy" in *Griswold* and *Roe*) nowhere mentioned in the document.

The stakes are high here, for this question implicates any constitutional decision that rests upon a "modern" reading of constitutional values. If Justice Peckham was "wrong" to find liberty of contract in the due process clause, can we say that Chief Justice Warren was "right" to find segregated schools a violation of equal protection—a decision that rested on the concept of "stigmatic" injury derived from modern social science?

The Court itself in *Griswold* was extraordinarily nervous about the possible analogy to *Lochner*. "Overtones of some arguments," Justice Douglas wrote in his majority opinion, "suggest that *Lochner v. New York* should be our guide. But we decline that invitation. . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."⁴ But, in the very next sentence, Justice Douglas presents us with one of the most charming

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1. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

2. *Roe v. Wade*, 410 U.S. 113 (1973).

3. *Lochner v. New York*, 198 U.S. 45 (1905). Laurence Tribe provides an extensive analysis of *Lochner* and the analogy to modern fundamental-rights cases. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 427-55 (1978). In Tribe's words, "[f]rom Justice Stone's footnote 4 to modern arguments about economic as against political liberties, the search for ways to make judicial review legitimate, given the rejection of *Lochner* . . . has preoccupied (one could say obsessed) constitutional scholarship for the last forty years." *Id.* at 453.

4. 381 U.S. at 481-82.

non sequiturs in all of constitutional discourse: "This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." Treat like cases alike, Douglas is saying—except when they're different.

These questions about *Brown*, *Griswold*, and *Roe* point to the "quest" of modern jurisprudence—at least its mainstream academic branch—the quest for "neutral" principles. No criticism of a controversial decision is more common than that the Court violated such principles; the critical literature in the wake of both *Brown* and *Griswold*—not to mention *Roe*—is replete with such criticisms. Herbert Wechsler, the scholar most responsible for the use of the phrase "neutral principles" in modern commentary, says in essence that the Court in *Brown* ignored them.⁵ "To be sure," Wechsler says,

the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?⁶

Other scholars have similarly made neutrality a key test of constitutional soundness. Robert Bork warned in 1971 that "we have not carried the idea of neutrality far enough"; not only must principles be applied neutrally, he wrote, but "[i]f judges are to avoid imposing their own values upon the rest of us . . . they must be neutral as well in the *definition* and *derivation* of principles."⁷ Otherwise, we are left with a Court "that makes rather than implements value choices," and this, Bork tells us, is equivalent to "limited coups d'etat."⁸

As these brief quotations suggest, the quest for neutral principles is a symptom of an even larger theoretical problem. In fact, modern jurisprudence is preoccupied with the idea of neutrality and with the *Lochner* analogy because it is still (after all these years, one is tempted to add) seeking to define the appropriate relationship be-

5. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959).

6. *Id.* at 15.

7. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971) (emphasis in original).

8. *Id.* at 6. It is not only conservatively inclined commentators who embrace neutrality as a desirable goal; John Ely seems to endorse the general idea of neutrality as well, when he writes in his criticism of *Roe* that "[a] neutral and durable principle may be a thing of beauty and a joy forever," so long as the principle in question has sufficient "connection" with "any value the Constitution marks as special." Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973). See also J. ELY, *DEMOCRACY AND DISTRUST* 54-55 (1980).

tween law and politics. However this dichotomy is expressed—law versus politics; judicial review versus democracy; questions of law versus question of fact—the issue runs like a red thread through a great deal of what is said by and about the Court.

I want to suggest that the various versions of this consensus theory of constitutional interpretation (as I shall call any theory that takes one of these dichotomies as a central premise) are wrong.⁹ Wrong in the sense that they start in the wrong place and, inevitably, end up in the wrong place. The question they ask is the wrong question; the task they set for themselves is the wrong task.

Arguments against this school of thought have been made by others, of course, including various writers who embrace what can be loosely termed the critical theory of constitutional interpretation.¹⁰ It is commonplace, in the critical school, to argue that law *is* a form of politics. Few, however, who make this general observation tell us how, exactly, law and politics are related; instead, most take refuge in vague generalization.

I want to go beyond these vague generalizations to describe what I see as the particular constitutional mechanisms—the doctrines and theories—that bring a particular relationship between law and politics into being. How precisely—by way of what clause, what formula—do American judges accomplish this blending of law and politics?

Moreover, I want to consider some of the jurisprudential implications of the basic critical insight that law and politics cannot be separated. Many critics of the consensus theory plunge headlong into blatant partisanship, or a kind of constitutional despair. Since

9. The most prominent consensus theorist on the bench, of course, was Felix Frankfurter; among academic commentators, Alexander Bickel and John Ely stand out as leading proponents of the theory. I have elsewhere discussed Justice Frankfurter in this light. See H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 128-37, 168-76 (1981). See also A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (2d ed. 1978); A. BICKEL, *THE MORALITY OF CONSENT* (1975); J. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 8.

10. Within this category I would include *both* those belonging to the critical legal studies "movement," such as Roberto Unger and Duncan Kennedy, *and* theorists such as Paul Brest and Laurence Tribe, who make similar kinds of observations about the political nature of law but do not draw from these observations the same types of conclusions as the (self-proclaimed) critical legal theorists. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 3; L. TRIBE, *CONSTITUTIONAL CHOICES* (1985); Brest, *The Fundamental Rights Controversy*, 90 *YALE L.J.* 1063 (1981); Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765 (1982); Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 209 (1979); Kennedy, *The Rise and Fall of Classical Legal Thought* (1975) (unpublished); Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983). Of course, the observation that law and politics are fundamentally inseparable does not originate with modern scholarship, but is, rather, as old as Aristotle. See NICHOMACHEAN ETHICS, BOOK V (M. Ostwald trans. 1962).

nothing is "neutral" or enduring, they seem to be saying, no constitutional principle is clearly better than any other; everything is naked power, so let's at least see that the good guys win—that summarizes the flavor (or the aftertaste) of much of the literature in the critical school.¹¹ But perhaps we can do somewhat better than that.

I

The first step is to understand why law and politics cannot be separated—are in fact not separate things—and a useful place to begin is with the law/fact distinction, and with a comparative perspective on that distinction. For if there is no such thing as "pure law" separate from particular sets of facts, if values and facts are not clearly separated, then the distinction between law and politics—between law and how things "are" in the world—becomes more difficult to maintain. And when one sees what counts as a "law" in other cultural contexts, one begins to wonder whether law can be said to exist apart from its specific social context.

The most useful perspective on these issues is that offered by legal anthropology. In his most recent book, Clifford Geertz points out that both anthropology and jurisprudence "see . . . broad principles in parochial facts."¹² Geertz examines the law/fact distinction, and points out that the fact "problem" in modern legal analysis—"[e]xplosion of fact, fear of fact, and, in response to these, sterilization of fact"—is a "chronic focus of legal anxiety."¹³ The difficulty that modern legal analysis has with "facts" is a reflection, Geertz says, of

a rather more fundamental phenomenon, the one in fact upon which all culture rests: namely, that of representation. The rendering of fact so that lawyers can plead it, judges can hear it, and juries can settle it is just that, a rendering: as any other trade, science, cult, or art, law, which is a bit of all of these, propounds the world in which its descriptions make sense.¹⁴

Law, Geertz says, "is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real."¹⁵ The key word here is "imagining"; how "facts" and "law"

11. The proposition that "partisanship" and "despair" are two of the most common jurisprudential stances that result from the basic critical insight concerning law and politics is developed at length in the longer work from which this paper is drawn. See H. HIRSCH, *SEEKING JUSTICE* ch. 2 (manuscript in preparation).

12. C. GEERTZ, *LOCAL KNOWLEDGE* 167 (1983).

13. *Id.* at 171.

14. *Id.* at 173.

15. *Id.*

are "imagined" is a process that varies from culture to culture. Legal facts, Geertz says, "are socially constructed . . . by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the scholasticisms of law school education." Law, he tells us, is a form of "local knowledge."¹⁶

Look closely at any society, Geertz is saying, and you see that what counts as a "fact" and what counts as a legal "rule" or "principle" are difficult to separate. Moreover, these distinctions bear a direct relationship to the organizing ideology of a society, to what people believe is good and bad, right and wrong, just and unjust. And such beliefs, of course, are "political" to their very core. Law is one way in which people give meaning to the world around them; a society with private property will have a different concept of "right" than a communal society; a religious society will have a concept of "duty" different from that of a secular one; different cultures will have different ideas of "truth" and "proof"—and so on. These ideas will determine not merely the *content* of legal rules, but what *counts* as a legal rule, or a legal fact, in the first place.

Adjudication, Geertz says, proceeds back and forth between two kinds of statements: "if-then" statements of general precept, and "as-therefore" statements of concrete application. The first is a language of "general coherence"; the latter, a language of "specific consequence." The first task of anyone who wishes to understand a particular legal system—a legal sensibility—is to elucidate the crucial words that carry these cultural messages. These words carry "coherence images"—that is, they will tell us much about what that society believes, about how the members of that society make their world coherent. Geertz illustrates his argument by examining three such words in three different cultures; a word meaning (very roughly) "truth" in the Islamic world; a word meaning "duty" (and more) in Indic culture; and a word meaning (roughly) "practice" in Malaysian society.¹⁷

Although Geertz does not venture into American constitutional discourse, his insights are useful nonetheless. What he provides is a method for understanding the relation between law and politics, a method that, when applied, casts considerable light on some perennial jurisprudential questions. If we direct our attention to constitutional language,¹⁸ we will find buried in the use of various terms and phrases many of the "coherence images" that constitu-

16. *Id.* at 167, 173.

17. *Id.* at 174-75, 183.

18. For an excellent discussion, see J. BRIGHAM, *CONSTITUTIONAL LANGUAGE* (1978).

tional law embodies. I want to illustrate this point by focusing upon one set of terms in particular—those surrounding the idea of the state's "police power" (which includes the concept of the "general" or "public" welfare), for it is within the contours of this phrase, I believe, that a great deal that really matters to constitutional decisionmaking takes place.

American constitutional discourse, I want to suggest, contains as one of its central assumptions—one of its most basic "coherence images"—the idea that "liberty can be restricted only for agreed, limited purposes." I will call this the liberty theorem.¹⁹ The phrase "police powers" is the way Americans designate the realm of normally acceptable restrictions of liberty; generally, we say that the state can exercise its police powers only to protect the "general welfare." Thus "police powers" is the phrase that captures the constitutionally acceptable *exceptions* to the liberty theorem. The Constitution, we may say, "contains" the idea of police powers (although they are not, literally, mentioned in the text, but must be derived from the Constitution's overall structure) as well as the idea of the general welfare (which *is* mentioned, twice: in the preamble, and in the list of general congressional powers in article I, section 8).

But what do these terms—police powers, public welfare—really mean? And how do we know that the liberty theorem is correct?

We "know" the liberty theorem is accurate only if we leave the formal world of the law and allow ourselves to enter the world of ideology—the province not so much of academic law but of the disciplines of history and political theory. We "know" the liberty theorem is correct if we have studied eighteenth-century American history (and its roots in British history) and have read (for example) Bailyn's study of the ideological origins of the revolution, or Wood's analysis of the constitutional period;²⁰ if we have studied the nature of modern constitutionalism, have read our Locke and Hobbes and Harrington—in other words, the liberty theorem is "correct" as a theory interpreting history, and, particularly, the history of ideas.

The liberty theorem is embodied in a great deal of Supreme Court rhetoric, and is the underlying premise of much that happens

19. The liberty theorem is developed at length in H. HIRSCH, *supra* note 11, chs. 1 and 2. The wording of the theorem presented here—that liberty can be restricted only "for agreed, limited purposes"—is taken from Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1415 (1974).

20. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969).

in constitutional decisionmaking. And yet it is a theory many constitutional lawyers will be uncomfortable with, at least when stated explicitly, precisely because its validity cannot be demonstrated in a formal manner.

As for the "police power," it is usually defined generically as the power "to promote the health, safety, morals and general welfare" of the population.²¹ The Court once defined it as "the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community"²²—the verbiage varies a little from case to case, but usually follows this fairly standard form. It is the power, the Court once candidly admitted, "to govern men and things."²³

Police power allows the state to regulate the content of food and drugs; it allows the state to compel education to a certain age and to require school children to have certain kinds of inoculations; it allows the state to pass licensing requirements for numerous professions; it allows the state to regulate the age at which one may drink, marry, drive an automobile, make informed and knowing decisions (intimate or otherwise) about the direction of one's life; it allows countless regulations of industry—in short, it allows the state to proceed with much of what it does to govern day-to-day life.²⁴

When one examines the cases in which the Supreme Court has invoked the police power—either in overturning or in sustaining legislation—one is struck by two things: the fact that its substantive content changes over time, and, furthermore, that the generic term is never really defined or defended—it is simply invoked, usually in vague language, seldom with anything so much as a footnote attached to it. The state's police power is just one of those things that is somehow *there*; there is no equivalent of *Marbury v. Madison* or *McCulloch v. Maryland*, magisterially establishing, once and for all, a clear and unequivocal precedent; there is no single clause to hitch it to; there is no single ancient provision of British common law, no clause of Magna Carta, to which we can confidently point to prove its existence.

21. See E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 61 (1973).

22. *Atlantic Coast Line v. Goldsboro*, 232 U.S. 548, 558 (1914), *quoted in* E. CORWIN, *supra* note 21, at 104-05.

23. *License Cases*, 46 U.S. (5 How.) 504, 583 (1847).

24. There are many things to notice about this concept of police power: that it always contains some concept of "harm" that the state may reasonably prevent; that, however it be defined, it will contain ideas about the proper scope of government authority—the spheres of life the government may and may not enter; that where one puts the burden of proof—on those who challenge the state's exercise of the power, or upon the state itself in the first instance—can make an enormous difference to the outcome of any particular case.

The long historical view reveals several more things of interest about the police power. First, it seems to have gained importance over the course of the nineteenth century as a limit on another "meta-" doctrine, that of vested rights. In its own turn, the idea of vested rights had arisen as one of the principal judicial means of limiting popular sovereignty.²⁵ In fact, the closer one looks, the more the whole thing seems extraordinarily Hegelian; as Michael Perry puts it, "[s]overeign state legislative power was the thesis; the doctrine of vested rights, limiting the sovereign power, was the antithesis; and the doctrine of police power, which sanctioned the invasion of vested rights for the sake of the public welfare, was the synthesis."²⁶

A by-product of the police powers doctrine was to foster the developing idea of "substantive" due process, as if those fundamental rights, which the concept of vested rights had been elaborated to protect, had to go *somewhere*.²⁷ So that, early in the nineteenth century, the contest was between vested rights and the police power; by the close of the century, the contest was between substantive due process and the police power.

The back-and-forth character of these doctrines—police powers on one side, vested rights or substantive due process on the other—points to an important conclusion. "Police powers" are really the ultimate elastic doctrine in constitutional analysis; whatever the Court's notion of the sphere of fundamental personal rights at any given point in time, "the" police powers are adjusted, like an accordion, to account for what—according to the Court—society is willing to regard as reasonable invasions of those rights for the public good. An examination of what the Court says about police powers thus becomes a key component of fundamental rights analysis; just as a virus can sometimes be detected only by the presence of antibodies, there will be times when the best measure of how the Court is defining fundamental rights will be to look at what the Court says about police powers.

Thus, whether explicitly mentioned or not, different accounts of police powers can be found at the root of any number of major controversial cases, past and present. This is true, for example, of *Lochner*, the case that sends shudders through contemporary defenders of fundamental-rights adjudication.

25. See Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 697 (1976). Perry draws extensively upon the work of Corwin; see generally E. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948).

26. Perry, *supra* note 25, at 697-98 n.44.

27. The due process clause was for many reasons the inevitable place. See *id.* at 699-705; H. HIRSCH, *supra* note 11, ch. 1.

Lochner is usually discussed as an example of a now-discredited theory of substantive due process. That it may be, but it is discredited as due process *because* our underlying ideas about appropriate police powers have changed. To recall the facts, New York had passed legislation limiting the number of hours a baker could work. The state said that this was a health measure—and thus a justified exercise of its police power—although the majority of the Court suspected that it was really a labor law in disguise.

The majority in *Lochner* is usually criticized for finding a “liberty of contract” in the due process clause.²⁸ But is it not far more accurate to say that the majority erred in not construing New York’s police powers broadly enough to *allow* this particular invasion of the liberty of contract? Would anyone candidly deny that the right to make a contract *is* a fundamental right in Anglo-American law? Outside discussions of this particular case, probably not.

In this particular weighing of police powers versus vested rights (now residing in the due process clause) the majority (we would say today) did not rank the constitutional values correctly. This is, in fact, what Justice Harlan says in his dissent in the case, making his opinion far superior, it seems to me, than the more famous dissent by Justice Holmes; Harlan grants that liberty of contract exists and weighs it against the state’s police power; Holmes merely says, in effect, that state legislatures can do what they please, avoiding the real choice between legitimate constitutional values the case presents.

Similarly, if we look at those cases that constitute the revolution in constitutional law at the time of the New Deal, what is really going on is a change in the underlying concept of the police power. In the wake of the Depression and Roosevelt’s Court-packing threat the Court found adequate constitutional grounds for congressional and state legislative action aimed at promoting a kind of economic “welfare” previously believed to lie outside the realm of governmental power. We thus find Court opinions studded with statements such as the following, in the Minnesota mortgage moratorium case:

The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of

28. Such an analysis is typical of casebooks; see, e.g., R. CUSHMAN, *LEADING CONSTITUTIONAL DECISIONS* 146-52, 192 (16th ed. 1982).

this Court.²⁹

The case concerned a law passed by the Minnesota legislature granting temporary relief from mortgage foreclosures; Minnesota, of course, is a farm state, and hundreds of family farms were threatened.

The moratorium passed by the Minnesota legislature, without question, violated, in a strict sense, the clause of the Constitution forbidding states to "impair the obligation of contracts"—*unless* we graft onto the case something like Hughes's statement that all constitutional provisions must be read in light of a larger police power.³⁰ What Hughes is really saying is that now, today, in the wake of our recent experience, we believe different things about the correct role of government vis-à-vis the economy. We now believe that protecting the sanctity of individual contracts is not the state's highest duty, that the state has obligations to protect the general welfare that go beyond protecting private contracts.

The manner in which other clauses of the Constitution were similarly reinterpreted in the late thirties is an oft-told tale, and does not bear repetition here. Suffice it to say that the New Deal accelerated a process, begun earlier in the century, by which the commerce clause, in particular, became a kind of *federal* police power clause, permitting (by previous standards) extraordinarily broad congressional action.³¹

II

What does all of this tell us about the nature of constitutional interpretation, the quest for neutral principles, and the relationship between law and politics?

29. *Home Building and Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934).

30. Justice Sutherland correctly points out in his dissent that the contracts clause was written against a background of various kinds of state legislation passed for the relief of debtors, quite similar to the Minnesota legislation at issue in *Blaisdell*. Numerous historians have emphasized the contribution such legislation made to the growing desire in the years preceding 1787 to call a constitutional convention. (For a recent treatment, see G. WOOD, *supra* note 20, ch. 10.) Academic defenders of *Blaisdell*, such as Charles Miller, attempt to alleviate the burden of this historical record by arguing that the earlier relief legislation (in the 1780's) "exacerbated economic instability," whereas the Minnesota law was in keeping with the "large purpose" of the contract clause, "the smooth functioning of the economy." In Minnesota, Miller writes, "economic conditions were completely different." C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 46 (1969). This is, of course, hindsight; in 1934, no one could say with any certainty what course of action would "exacerbate economic instability." It is also playing games with words; what piece of economic legislation (no matter how blatantly unconstitutional) could *not* be justified on the grounds of its importance to the "smooth functioning of the economy"?

31. See C. PRITCHETT, *CONSTITUTIONAL LAW OF THE FEDERAL SYSTEM* 222-25 (1984); L. TRIBE, *supra* note 3, at 340.

It tells us quite a bit, I think, for what becomes clear the longer one looks at cases dealing with police powers (or with substantive due process, the flip side of the police powers) is that the Constitution itself provides only the broad *categories* in which these issues are framed. The Constitution—its structure, its history—gives us the *idea* of state police power it gives us the due process clause. The Supreme Court fills in the rest.

In the process of filling in this content the Court looks—where? Out there, somewhere, to some amalgamation of public opinion, current social morality, current social data, contemporary “experience”—in short, the Court looks to politics, to prevailing ideas of political morality, and tells us what the “general welfare” requires—and hence what the Constitution allows the state to do under its police powers. In Perry’s words, “[t]he scope of the ‘public welfare’ is a function of social conventions; the basic determinants of the public welfare are the conventional attitudes of the socio-political culture.”³² In the language of Clifford Geertz, what the Supreme Court is doing is what some institution or process must accomplish in all legal cultures: it is providing the “coherence images” that blend the empirical, the moral, and the political, and that constitute the real stuff of the law.

One consequence of this view is that, quite simply, there is no such thing as a “neutral” principle in cases such as this, for the outcome will always ultimately depend upon some blending of contemporary values and social facts—some “coherence image”—and such blendings, such value judgments, cannot be “neutral.” Police powers can have no meaning apart from some understanding of what the general welfare requires, and, unless we wish to adopt a ruthlessly intentionalist stance—that the “general welfare” must always mean no more than it meant in 1789, when (to take the most obvious difficulties) medicine, education, and industry were rudimentary—we have no choice but to allow the Court to fill in the blanks.³³

Contemporary opinion may well draw distinctions that may seem insufficiently “neutral” to some academic observers—for example, it may draw lines between economic decisions (holding them to be, by their very nature, “social,” and thus a fit subject for legis-

32. Perry, *supra* note 25, at 735.

33. We could, of course, take refuge in deference to the legislature—but even that carries us only so far away from the Court’s judgment, so long as the Court retains *any* of its reviewing power. And deference has other problems of its own. On deference, see text accompanying note 47, *infra*. For a lengthier discussion of both deference and intentionalism, see H. HIRSCH, *supra* note 11, ch. 2.

lative supervision) and "intimate" decisions;³⁴ or between political parties and other forms of political association.³⁵ Those who advocate neutrality often confuse it with generality—that is, the idea that the law must treat all the members of a particular category in the same manner. But the decision as to how to divide up reality into categories, or how to treat the categories themselves, cannot be "neutral." By their very nature, these are value-laden decisions.

The quest for neutral principles is a symptom, really, of the fear of judicial subjectivity. "Why should the Court, a committee of nine lawyers, be the sole agents of change?" Robert Bork demands.³⁶ But to pose the question that way is, I submit, to misread much of our constitutional history. *Judgment* is not naked and arbitrary power, no matter how much it may look that way to those who disagree with a particular decision nor cluster of decisions. "Nine lawyers" were not the "sole agents of change" during the *Lochner* era, nor during the New Deal; in fact, the Court then was somewhat passively reflecting various aspects of mainstream political opinion.

If the Constitution does grant the states police powers, and those powers must be tied to some understanding of the general welfare, then judicial subjectivity is inevitable, and neutral principles—principles that do not draw fine lines or make specific judgments about particular things, principles that do not have some moral dimension, some notion of what kind of society this is or should be—will be hard to come by.³⁷

A second conclusion that flows from this line of reasoning is that the current debate among constitutional scholars about "interpretivism" is quite beside the point, at least in cases concerning a conflict between the police power and substantive due process. Ely defines interpretivism as the stance that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," and noninterpretivism as "the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered

34. Such a distinction, of course, can provide an "answer" to the "problem" of the *Lochner-Griswold* analogy; see *supra* text accompanying notes 1 and 2. The analogy between the cases is thus problematic only in the context of an ahistorical understanding of "correct" constitutional doctrine.

35. Wechsler uses the failure of some commentators in the fifties to be "consistent" in their application of first amendment principles to *both* the Communist Party and labor racketeers as evidence of a lack of neutrality. See Wechsler, *supra* note 5, at 14.

36. Bork, *supra* note 7, at 6.

37. For a somewhat similar argument made in the context of the first amendment, see L. TRIBE, *CONSTITUTIONAL CHOICES* 188-220 (1985).

within the four corners of the document.”³⁸ But what could be said, within such a framework, of *Lochner* or the Minnesota mortgage case? Once we say that the “error” of *Lochner* was not the sudden discovery of liberty of contract in the due process clause, but rather the particular *weighing* of that value against the state’s police power, and the majority’s limited *definition* of the police power, then making a distinction between a value “in” the Constitution and one “beyond” it no longer makes a great deal of sense.

In this light, the important question about *Lochner* is no longer political (in the conventional sense, i.e., “should judges exercise so much power?”; however they decided the case, they would have been exercising enormous power), nor jurisprudential (“should judges look ‘in’ the Constitution or ‘beyond’ it?”) but rather epistemological: how can judges gauge and measure what society at any given time believes necessary to the public welfare? What kind of materials should the judges examine to make such judgments? What is more important—public opinion or scientific information and the opinion of “experts”? In what direction should judges err, given evidence of conflicting public or scientific opinion? At what point in the development of public opinion can judges say a new consensus exists? What contribution should judges make to the development of that consensus? What if there *is* no consensus?

These are all, to be sure, enormously difficult questions—but, I submit, they are the relevant questions, which diatribes about judicial imperialism and debates about interpretivism only obscure. And, if we recall the liberty theorem, they are the most important questions the Supreme Court faces. In any era, the premier constitutional question will be what exceptions to the liberty theorem the Supreme Court allows.

A final conclusion follows from this line of analysis. What is often happening beneath the surface in an unusually controversial case is one of two things: either (as many commentators have told us³⁹) the Court is far behind or far ahead of public opinion; or, as seems increasingly the case today, the Court is reflecting the opinion on one side of an issue on which the public is severely divided—an issue, in other words, for which several contradictory coherence images coexist in society, and for which no clear data—no clear

38. J. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 8, at 1.

39. See Robert Dahl’s classic article, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); see also Adamany, *Legitimacy, Realignment Elections, and the Supreme Court*, 1973 WIS. L. REV. 790; Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976); Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975).

social "facts"—allow the Court to say one segment of opinion is obviously correct.

In this latter case, the Court is charged, in effect, with the task of basing its decision on some social consensus—some understanding of what the general welfare does and does not require, what fundamental rights the due process clause does and does not protect—but such a consensus doesn't exist. The Court must then square the circle—that is, the Court must choose, but make it look as if its choice is inevitable, given the kind of society and people we are. In this gloomy light, I will turn to a discussion of a few more recent issues.

III

Brown v. Board of Education is perhaps as close as America will ever come to a revolution from above. The decision turned, of course, on the equal protection clause; police powers lurk only in the background, in that public education is itself a classic expression of that power.

But I want to suggest that *Brown* ultimately depended on ideas much more directly linked to the police power question, at least as I have described it here. In its concept of "stigmatic" injury—the damage done to the hearts and minds of black school children about which Chief Justice Warren wrote so eloquently—the Court was announcing yet a further addition to the list of the kinds of public welfare for which the state is responsible. "Psychological harm is harm the state cannot inflict as it goes about exercising its traditional police power functions"—that, in a sense, is what *Brown* establishes.

Brown says, in effect, that the equal protection clause *requires* that such police powers be exercised only in certain ways. And how does the Court *know* that's what the equal protection clause requires? How does the Court *know* that stigmatic harm is constitutionally relevant harm?

By "modern authority,"⁴⁰ which in this case means the findings of social science. We know things about human beings we did not know at the time of *Plessy v. Ferguson*,⁴¹ the Warren Court is saying; we know that people are hurt in ways other than by physical violence; we know, further, that we now live in a society where education plays a vastly more important role in the lives of these individuals than it did a century before, at the time of adoption of the

40. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

41. 163 U.S. 537 (1896).

fourteenth amendment. *Brown* turns, in the end, on what we know about people and about education.

Roe v. Wade, on the other hand, turns on what we cannot know: whether the fetus, in its earliest stages of development, is a human being—a “person.” Given that we cannot know, how can we allow the state to interfere with a woman’s own decision as to how to resolve her extraordinarily difficult situation? We don’t know that the fetus is a person, but we do know that the pregnant woman *is* a person, entitled to her own moral beliefs and to the control of her own body; we know, further, that even when abortion is illegal, thousands of women have them, often at great risk to their health and safety.

Under these conditions, how can we allow the state, in the exercise of its police powers, to interfere with a medical procedure, safer than childbirth if performed early in a pregnancy,⁴² when we do not permit the state to interfere with most other aspects of bodily autonomy or reproductive decisionmaking? Absent clear evidence of harm to another person, how can we *not* see abortion as a matter for the woman to decide for herself, given the things we believe, today, about individual autonomy, things reflected in the view that family planning and contraception are matters beyond the realm of legitimate state interest?

Once we are sure that a fetal “person” does exist, in the later stages of pregnancy, the state’s police powers come into play, of course, and the woman’s right to privacy must be weighed against the legitimate state interest in the welfare of the fetus. Quite sensibly, the Court allows this state interest to enter legislative decision-making at the point of fetal viability—the point at which we can be sure we are dealing with a *separate* “person.” But to allow the state to legislate on behalf of the fetus before that point of viability is to allow the state to embody in its law a moral guess—one that violates the much more firmly established right of the woman to her own moral beliefs and to control of her own body.

In *Brown* and in *Roe*, as in *Lochner* and the New Deal cases, the Court ultimately is measuring the closeness of fit between the moral and political judgments embodied in state legislation, on the one hand, and social facts on the other. The “fact” that stigmatic injury is a real thing to the Warren Court (in *Brown*); the “fact”

42. See *Roe v. Wade*, 410 U.S. at 163. See also Hilgers, *The Medical Hazards of Legally Induced Abortion*, in *ABORTION AND SOCIAL JUSTICE* 57 (T. Hilgers ed. 1972). Hilgers writes that the medical procedure of abortion “is potentially 23.3 . . . times as safe as the process of going through ordinary childbirth” (quoting Amicus Curiae Brief of the American College of Obstetricians and Gynecologists, *Doe v. Bolton*, 410 U.S. 179 (1973)).

that we cannot know at what point in a pregnancy the fetus is a person; the "fact" that industrial employees do not make free choices in the contracts they make (in *Lochner*); the "facts" of a modern industrial economy as the post-1937 Court interpreted them in the New Deal decisions—the Court's reading of all of these "facts" is what these landmark cases turn upon.

What all of this points toward is a jurisprudence rooted in the admittedly sloppy process of reconciling constitutional doctrine to changing moral and political judgments, and, especially, the social "facts" upon which such judgments ought to be based. Often, the Court is telling us that the moral judgment embodied in the legislation under question is based on an outmoded or an inaccurate reading of social "facts." This is a sloppy process, because the kinds of social facts needed do not lend themselves to scientific specification. But, to recall Geertz's perspective, this kind of messy reconciliation between what a society defines as fact and what a society judges to be moral is what lies at the base of all law. What creates this sloppy indeterminacy is the nature of social and political life, and not the nature of the judicial process, as many critics of this or that Supreme Court decision would have you believe.

IV

Further argument can be developed out of this line of analysis. Both *Brown* and *Roe* suggest that many of the modern era's most difficult cases concern what can be called issues of personhood, or issues of the self. In *Brown*, the Court constitutionalized the state's obligation not to inflict stigmatic injury to the self; in *Roe*, the constitutional argument turns upon the fetus's status or nonstatus as a person.

Today many minority groups are pressing claims upon the courts that at their base are claims about personhood—about the self. To illustrate this in concrete terms, I will briefly mention three "pending" constitutional issues, dealing with the rights of gay persons, the mentally ill, and children—three groups whose status as "persons" has troubled both law and liberal political theory for some time, and about whom contemporary coherence images may be said to be in flux.⁴³

For gay persons and the mentally ill, and, to a lesser extent for children, we can say that the group's moral and legal status is in flux because current empirical information seems to make many of

43. The observations presented here are developed at great length in H. HIRSCH, *supra* note 11, chs. 3-6.

the old moral and legal judgments about them appear arbitrary and unjust.

Consider the status of homosexuality in the eyes of modern psychology. It is now reasonably clear that a homosexual sexual preference is not in any meaningful sense a rational "choice," but is rather an innate psychological preference determined, through a process still only vaguely understood, early in life, and not subject to alteration later. What *is* a choice for the homosexual is the expression of his or her preference in overt behavior. Moreover, it is abundantly clear that forcing people to deny their most intimate feelings does harm no less brutal than the stigma discussed in *Brown*.⁴⁴

In the light of this knowledge, what could allow laws forbidding homosexual conduct to stand? First, it would have to be posited that homosexuality is *not* an innate characteristic (and one governing a fundamental aspect of life, the choice of intimate partners), but is rather a moral/behavioral choice, akin to the choice to become a thief or to use heroin. Second, it would have to be argued that society can legitimately forbid behavior based upon such a choice, even absent evidence of concrete harm done to persons or things.

The first step in the theory, of course, is based on assumptions which we now know (with reasonable certainty) to be untrue. And once the first step is discredited, the second step requires an argument that is exceedingly difficult to make—difficult to the point of impossible, in the judgment of many.⁴⁵

Again, as in *Brown* and *Roe*, it seems that the legal argument for gay rights depends on a kind of "closeness of fit" between moral judgments and empirical "facts"; when the fit is not sufficiently tight, to forbid the conduct in question (again, absent clear evidence of harm to others) appears arbitrary, irrational, and fundamentally unjust; it betrays one aspect of our coherence image about what kind of society this is—in the case of sexuality, one that allows consenting adults to make personal and intimate decisions without undue interference from the state.

In the case of the mentally ill, there are similar changes in contemporary understanding that call into question some aspects of standing law. We know, for example, that some types of psychosis

44. See generally Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

45. Presumably, such an argument would be based on the state's power to foster "traditional" families. But such an argument is quite difficult to make in light of recent precedents and the principles they embody. See Note, *Developments in the Law*, *supra* note 44.

are far more variable and idiosyncratic than was previously thought, and thus that a quick diagnosis can be inaccurate and misleading; this has implications for a number of legal issues, for example, whether there is a right to have one's classification as mentally incompetent reviewed, and with what sorts of due process requirements attached. We know, similarly, that under conditions of minimal custodial care, certain mentally ill patients will not only fail to improve, but will *lose* some of their capacities for self-care; this has implications for the developing idea of a "right to treatment."⁴⁶

In the case of children, we know that it is often erroneous to assume that parents and their children have an identity of interests. Consider, to take an obvious instance, the number of cases of sexual abuse by parents. We know, furthermore, that treating juveniles with the respect that due process affords can have far more rehabilitative effect than treating them as wards of the state with no rights whatsoever. We know that some youthful offenders are sexually assaulted the moment they are incarcerated. We know that teenagers become pregnant at an alarming rate. All of these "facts" carry implications for legal doctrine and our notion of what rights children have.⁴⁷

What all of these examples point to is a view of personal rights that is grounded, ultimately, not so much in the text of the Constitution (although, of course, there must be some textual basis for any declaration of a constitutional right), nor in the specific intent of the framers, nor in deference to the legislature (for there are myriad reasons why legislatures may make the "wrong" decisions in these cases; to name only the most obvious of them, legislatures are prone to save money at the expense of the politically powerless, and legislatures may reflect public opinion that is prejudiced against a minority group).

Rather, these examples point to a view of rights that grounds them in our "deepest" moral judgments, judgments that are themselves based upon some kind of knowledge. Can we be certain the fetus is a person? Are black school children harmed by "separate but equal"? Are gay persons capable of being anything different without doing damage to their most basic selves? Can we accu-

46. See *Jones v. United States*, 463 U.S. 354 (1983); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981); *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Lessard v. Schmidt* 349 F. Supp. 1078 (E.D. Wis. 1972).

47. See *Parham v. J.R.*, 442 U.S. 584 (1979); *Carey v. Population Services*, 431 U.S. 678 (1977); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). For a general discussion, see Note, *Developments in the Law*, *supra* note 44.

rately label someone as mentally incompetent on the basis of the flimsiest of psychiatric examinations? Do we harm some children when we assume their parents know what is best for them, or when we institutionalize them without due process? These are the questions upon which landmark constitutional cases must turn. Answers to these questions cannot be "neutral," nor can they be given with the accuracy of perfect predictability. But answers can, and must, be attempted.

V

The line of analysis suggested here has implications for the most basic question in American jurisprudence, that of the supposed tension or conflict between the institution of judicial review and the democratic process. No issue has absorbed more attention among legal scholars or produced more vehement disagreements; it is hard not to agree with the comment that, like the opponents in a theological debate, neither side really expects to make any converts or convince any of its opponents.⁴⁸

The two sides of the debate are excruciatingly familiar and easy to summarize. There are those who believe there *is* a tension or conflict between judicial review and democracy, and who draw from their observation of that tension various postulates about how the Supreme Court ought to behave—usually, that the Court ought to behave with deference to the legislative will; sometimes, that the Court ought to vigorously protect the democratic process itself.⁴⁹ On the other side are those who respond that a constitution is *meant* to be counter-majoritarian; that it is in the nature of a constitutional right to be guaranteed by the judiciary precisely because it *is* contrary to the legislative will—"rights are trumps," in Dworkin's memorable phrase.⁵⁰

The line of analysis proposed here, however, suggests that there is a far more complex and subtle relationship between majority sentiment and judicial decisionmaking than either side in this debate usually recognizes.

If I am right that many important constitutional cases turn on a conception of the police power, and that the content of the police power at any given time will fluctuate with the kinds of "coherence images" I have been describing, then all of these decisions will rest in the end on ideas that are derived from and ultimately dependent upon "democratic" sources. These coherence images, these notions

48. The comment is Sanford Levinson's.

49. See, e.g., the words by Bickel and Ely, *supra* note 9.

50. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977).

of political morality, may well be "deeper," more fundamental, and more basic than any specific legislative act. Thus a Supreme Court decision overturning a legislative judgment can be thought of as using one kind of democratic judgment to overturn another. What the Court may well be doing in such cases is calling us to account—telling us to stop legalizing our prejudice against a particular group, because such prejudicial legislation violates one of our deepest beliefs. Or, the Court may be pointing to social "facts" that demonstrate the prejudicial source, or harmful result, of a particular piece of legislation.

To be sure, there is a paradox here, but only on the surface. Majority opinion (in the short-run, here-and-now) may believe, for example, that homosexuality is not "acceptable," and embody that belief in restrictive legislation. Such public opinion may also believe that the police power legitimately extends to such an issue.⁵¹ But it is in cases such as this that we must remember that the police power is exercised within the context of the liberty theorem.

It is the Supreme Court's task, in cases such as this, to remind us that we *also* believe in maximum liberty, absent clear evidence of concrete harm to persons or things; that such liberty includes, in today's world, sexual autonomy for adults; that we believe in equal protection; that we believe it is wrong to "punish" someone for an involuntary characteristic.⁵²

Social morality has many aspects that go beyond short-run legislative outcomes, and the Court is particularly well situated to incorporate these into its judgments. When the Court, acting on the basis of this "deeper" morality, overturns a specific legislative decision, it is simplistic in the extreme to view this merely as "undemocratic."⁵³ Such a characterization is based on a crabbed vision of what democracy and morality really are.

Of course, the Court could be "wrong" in its reading of the "deeper" social morality. But the evidence suggests at most occasional time lags. If nothing else, the abandonment by the Court in the late thirties of its opposition to the New Deal shows quite dramatically that the Court cannot hold out for long against a new and

51. Of course, the public may be sophisticated enough to believe that some type of conduct is "unacceptable" but that the police power does not legitimately extend to prohibiting that conduct. On this distinction, see the discussion in Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 442, 477 (1976).

52. On this point see R. DWORKIN, *supra* note 50, at 240-58.

53. David A.J. Richards's contrast between "conventional" and "constitutional" morality expresses the same point I am making concerning a society's "deep" moral beliefs. See Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 976 (1979).

firmly established social morality. Similarly, the ultimate acceptance of *Brown* by public opinion despite initial opposition of the most ferocious kind should calm the fears of those who worry about the undemocratic nature of Supreme Court action. Does anyone doubt that if the vast majority of Americans had ultimately rejected the morality of *Brown*, that rejection would have found judicial expression in one form or another?

Conservative critics of the Warren Court, I submit, are drawing the wrong conclusions from the record. The controversy surrounding many of those decisions is not evidence of judicial usurpation, nor of judicial subjectivity gone out of control, nor of an absence of neutral principles. Rather, the controversy is a symptom of social upheaval and divisiveness concerning the issues of political and social morality the Court had no choice but to face. We should not mistake a lack of social consensus and clear facts for evidence of a judiciary gone awry. And, in the presence of a divided morality, as well as in the absence of determinative facts about any given issue, we must remember that our deepest belief is in maximal liberty.

The question we ought to be asking is not whether there is a tension or conflict between judicial review and democracy. Rather, the questions we should ask are the epistemological questions I have enumerated here. We don't need judges who seek neutrality, but judges who seek accurate knowledge about what society most deeply believes and about what kinds of harm people really suffer. Only then will we find the appropriate relationship between law, facts, and persons.